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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 101.0053-00000	
<p>I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]</p> <p>on _____</p> <p>Signature _____</p> <p>Typed or printed name _____</p>		Application Number 08/480,908	Filed June 7, 1995
		First Named Inventor Gary K. Michelson	
		Art Unit 3772	Examiner Michael Brown

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

applicant/inventor.

assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

attorney or agent of record.

Registration number 34,383


Signature

Thomas H. Martin

Typed or printed name

330-877-0700

Telephone number

attorney or agent acting under 37 CFR 1.34.

June 11, 2007

Registration number if acting under 37 CFR 1.34 _____

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.
Submit multiple forms if more than one signature is required, see below*.

Total of 1 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.8. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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RESPONSE UNDER 37 C.F.R. 1.116
 EXPEDITED PROCEDURE
 EXAMINING GROUP 3772

PATENT
 Attorney Docket No. 101.0053-00000
 Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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In re Application of:)	Confirmation No.: 9745
Gary K. Michelson)	
Serial No.: 08/480,908)	Group Art Unit: 3772
Filed: June 7, 1995)	Examiner: Michael Brown
For: THREADED FRUSTO-CONICAL)	
INTERBODY SPINAL FUSION)	
IMPLANTS)	

Mail Stop AF
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

In reply to the Final Office Action of May 01, 2007, Applicant submits the following remarks for consideration by the Members of the pre-appeal brief conference.

I. Brief Background

The application includes eight (8) independent claims, claims 1, 25, 49, 69, 108, 144, 183, and 186, generally drawn to an implant for implantation into the spine. Independent claims 1, 25, 49, 69, 108, 144, 183, and 186 stand rejected under 35 U.S.C. § 103(a). The rejection of claims 1, 25, 49, 69, 108, 144, 183, and 186 under 35 U.S.C. § 103(a) is the subject of this Request for a Pre-Appeal Conference.

II. Clear Errors

(1) The Examiner's rejection of claims 1-7, 9, 11-25, 28-31, 33-75, 77-152, 158, 159, 164, 165, 170, 171, 176, 177, and 182-192 (of which claims 1, 25, 49, 69, 108, 144, 183, and 186 are independent) under 35 U.S.C. § 103(a) as being unpatentable

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over U.S. Patent No. 5,683,463 to Godefroy et al. ("Godefroy") in view of U.S. Patent No. 5,458,638) to Kuslich et al. ("Kuslich"), is erroneous because:

(a) in rejecting independent claims 1, 25, 49, 69, 108, 144, 183, and 186, the Examiner contends that Godefroy discloses an implant having a substantially frusto-conical shaped body including "a thread (13, 14)", and Kuslich discloses "threads (26, 28) along truncated walls (fig. 2)" (Office Action of May 01, 2007, paragraph bridging pages 2 and 3);

(b) furthermore, in rejecting independent claims 1, 25, 49, 69, 108, 144, 183, and 186, the Examiner indicates that "it would have been obvious to one having ordinary skill in the art at the time the invention was made that the spinal implant disclosed by Godefroy could be fabricated with threads along the truncated side walls" (Office Action of May 01, 2007, paragraph bridging pages 2 and 3);

(c) in response to the rejection under 35 U.S.C. § 103(a) based on Godefroy and Kuslich, Applicant submits that the Examiner erroneously contends that many of the elements of the claims are disclosed by Godefroy and Kuslich;

(1) Applicant submits that Godefroy does not teach an implant having threads, but instead teaches an implant having a body with "annular external ribs 13, 14, and 16 [that] are preferably toothed to prevent both axial movement in translation and rotation of the implant," and, in doing so, hold the implant in place (Godefroy, col. 2, lines 58-61 (emphasis added));

(A) the definition of a thread is "the spiral ridge of a screw, nut, etc."

(Webster's New World Dictionary and Thesaurus, Second Edition);

(B) accordingly, Applicant submits that Godefroy does not teach using a thread;

(2) Applicant submits that Kuslich does not teach truncated walls in the threaded embodiment of the implant disclosed therein, but instead teaches an implant (10), as shown in Fig. 2, including a body (12) having a cylindrical shell (22) and threads 26 and 28 provided around the cylindrical shell (22) (Kuslich, Fig. 2);

(A) "threads 26 and 28 are formed on the exterior surface of shell 22

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spirally would around shell 22 and integral therewith" (Kuslich, col. 4, lines 13-15);

(B) accordingly, Applicant submits that Kuslich does not teach an implant having threads along truncated walls;

(d) as such, Applicant submits that the rejection under 35 U.S.C. § 103(a) cannot be maintained because, contrary to the Examiner's contentions, many of the elements relied upon for the combination used to reject independent claims 1, 25, 49, 69, 108, 144, 183, and 186 are not present in either Godefroy or Kuslich;

(e) in response to the rejection under 35 U.S.C. § 103(a) based on Godefroy and Kuslich, Applicant also submits that the references actually teach away from a combination thereof;

(1) as discussed above, the Examiner indicates that "it would have been obvious to one having ordinary skill in the art at the time the invention was made that the spinal implant disclosed by Godefroy could be fabricated with threads along the truncated side walls" (Office Action of May 01, 2007, paragraph bridging pages 2 and 3)

(2) however, Applicant submits that replacing the ribs (13, 14, and 16) of Godefroy with the threads of Kuslich (26, 28) would assist in rotation of the implant (Kuslich, col. 4, lines 17-20 and 40-45), and would render the Godefroy implant unsuitable from its intended purpose of resisting rotation of the implant;

(3) as such, Applicant submits that the rejection under 35 U.S.C. § 103(a) also cannot be maintained because Godefroy and Kuslich teach away from a combination thereof;

(f) because the combination of Godefroy and Kuslich runs counter to the teachings thereof, there is no motivation to support such a combination, and Applicant submits that the Examiner's obviousness rejection based thereon fails; and

(g) accordingly, Applicant submits that independent claims 1, 25, 49, 69, 108, 144, 183, and 186 are patentable, and that claims depending therefrom are patentable at least due to their dependency from an allowable independent claim.

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III. Conclusion

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: June 11, 2007

By: 

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